Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 181.

SANTIAGO AINSA, ADM'R, ETC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF THE CASE.

This case was instituted in the Court of Private Land Claims by the filing on the part of the United States under the 8th section of the act of March 3, 1891, of the petition set out on pages 1–3 of the record. This petition alleged that defendant Ainsa, as administrator, claimed to be the owner through certain mesne conveyances of a tract of land in the Territory of Arizona known as the "Rancho de San José de Sonoita;" that such claim was by virtue of a grant made by officers of the Republic of Mexico claimed to be authorized by the laws

and usages of that republic to do so, and that such lands are in the territory acquired from Mexico by what is known as the Gadsen Purchase; that said defendant claimed that by said grant he acquired a fee-simple title to the lands so granted, and that his title was complete and perfect at the date when the United States acquired sovereignity over such lands; that said defendant has not voluntarily come into the Court of Private Land Claims under the provisions of the act establishing said court; that neither said defendant nor his intestate or any grantor now is or had ever been in possession of the lands so claimed; that said lands had never been designated by occupation or segregated from other lands; that the boundaries of said lands are open to question, and that the location, extent and boundaries of the lands are uncertain and indefinite; that said grant is invalid and void because same was not made according to the law then in force, or by any authorized officers or persons; that at the date when the United States acquired sovereignty over the territory which embraces said lands, they were not located, nor were the title papers recorded in the archives of Mexico; that certain portions of the lands so claimed had been patented by the United States to defendants Richardson, Watkins and Fleming, and that all of said lands so patented are within the said claimed limits of the lands claimed by defendant Ainsa. The petition prayed that defendant Ainsa be served with notice and be ruled to answer the petition, and ruled to produce the title papers upon which he based his claim to said Rancho San José de Sonoita, and to file a copy of the same with his answer and to produce and file a map of the lands claimed by him; that the other defendants answer the petition and disclose their muniments of title; that the title to said lands be settled and adjudicated, and if the title be adjudged to be valid that the extent and boundaries thereof be then settled and adjudicated, excepting any part of such lands

that shall be found to have been disposed of by the United States, and if the title to said lands be found invalid, that the court so decree.

Defendant Ainsa in his answer and amended answer (rec. pp. 6–9) alleged that he was the owner in fee, holds and possesses the lands covered by said land grant under and by virtue of a certain instrument in writing now and hereafter designated as and being a grant title, bearing date May 15, 1825, made and executed by Juan Miguel Riesgo, commissary general of the treasury, public credit and war of the State of the Occident, in the name of the sovereign nation of the Mexican Republic, under and by virtue of article 81 of the royal ordinances of intendentes of December 4, 1786, and pursuant to the provisions of the royal institute of October 15, 1754, which is quoted in the same article, and under and by virtue of the other laws governing said action.

That under and by order of such laws such proceedings were thereunder lawfully and regularly had as that the said commissary general of the treasury, public credit and war of the State of the Occident, in the name of the sovereign nation of the Mexican Republic, duly and regularly and for a good and valuable consideration, to wit, the sum of one hundred and sixteen dollars, two reales and five grains, and for other good and valuable considerations in said grant title set forth and described, did, on said May 15, 1825, sell and convey in fee to one Don Leon Herreros the land hereinbefore mentioned and more particularly described, commonly known as and called the San José de Sonoita grant or private land claim. That the said grant or private land claim was instituted by a petition of said Don Leon Herreros to Brigadier General Cordero, governor and intendente of the provinces of Sonora and Sinaloa, praying for two sitios of land, more or less, in a place known as Sonoita, in the jurisdiction of the presidio of Tubac, and that proceedings of survey,

valuation and publication were taken on this petition as required by law and as set out in the said title papers, and on May 15, 1825, the tract as surveyed, according to the natural landmarks and boundaries set out in said proceedings of survey, was sold to said Don Leon Herreros for the sum of one hundred and sixteen dollars, two reales and five grains, which amount was thereupon paid by said grantee; and that thereupon, on said May 15, 1825, there was issued to the grantee the testimonio or titulo of said grant, duly recorded in the archives of Mexico, to wit, on page 2 of the proper book in the office of said commissary general.

The date of the sale of the land is incorrectly stated in this answer as May 15, 1825. This is the date when the final and formal title paper in fee was executed by the commissary general of the treasury, public credit and war of the State of the Occident, who was the highest official of the general Mexican government in the State of the Occident, but the land had been sold and paid for on November 12, 1821. The extension of title on May 15, 1825, was by virtue of the sale of the land and the payment made by the purchaser November 12, 1821.

The answer further alleged that the map executed by George J. Roskruge, Esq., and filed with the answer, is a correct map of the said land grant, and correctly represents the boundaries of said grant and the lands embraced therein, and that said grant comprises 12,147.69 acres, as shown by said map; that under the provisions of the act of July 22, 1854, a petition had been filed with the United States Surveyor General of Arizona, praying for the confirmation of said grant, accompanying which petition were the original title papers of said grant; that thereupon the said United States Surveyor General caused said grant to be investigated by one R. C. Hopkins, a duly authorized and competent agent of the United States, and the said United States Surveyor General, in his official report,

under date of January 14, 1880, to Congress on said grant stated that said special agent Hopkins reported that the expediente of said grant had been found in its proper place in the archives of Mexico; that said expediente was written on the corresponding stamped paper; that the proceedings of survey, valuation, publication and sale were all regular; that the signatures to the title papers were genuine, and that there was nothing to cast suspicion on the *bona fide* character of the original title papers, and said United States Surveyor General reported said grant as a valid one and recommended its confirmation to the extent of one and three quarter square leagues, as measured by the original grantee, and no more.

Defendant further averred that all of the steps and proceedings in the matter of the grant and sale of said lands were regular, complete and lawful, and vested a perfect title in fee thereto in the grantee of said grant, and that said grantee at the time went into the actual possession, use, and occupation of said grant and erected the proper monuments thereon, and that said grantee and his descendants and legal representatives have continued ever since and until the present time in the actual possession, use and occupation of the same and are now seized and possessed in fee thereof; that said grant documents constitute a complete and definite grant in fee by way of sale, coupled with the condition subsequent not to abandon the same for a longer period than three years without good reason, which would subject the tract to adjudication to third parties who might apply for or denounce the same; that no forfeiture of said grant was ever claimed, and that this defendant is entitled to a confirmation of said grant in accordance with the metes and bounds and natural landmarks established by the said survey thereof, and that it vested in the grantee a perfect and valid title in fee to the whole of said tract so surveyed.

The court held that the burden of proof was on the grant claimant, and defendant Ainsa introduced as a witness R. C. Hopkins, who testified that he was in his 78th year; that from 1855 till 1886 he was in the service of the U. S. government in connection with Spanish land grants in California and Arizona; that in 1879 he was sent to Mexico as a special agent of the Interior Department to examine the records in the State of Sonora, at Hermosillo and Urez; that he examined in the archives of Sonora the signatures of officials to grants that he supposed were in the Territory of Arizona, the portion ceded to the United States; that he spent two or three or four months in the archives, and made the search with considerable care; that in 1880 he was employed by the United States in the office of the Surveyor General for Arizona.

Witness was shown the paper purporting to be the title paper of the San José de Sonoita grant, and testified that he had seen it in the Surveyor General's office of Arizona; that he had seen in the archives a great many signatures of the persons whose signatures were on said title papers, and that the signatures of Riesgo and Mendoza were, in his opinion, genuine. Said title paper and translation were then offered in evidence. Witness further testified that he saw in Hermosillo, in 1879, the matrix of the grant, and examined it sufficiently to see its character, and that his recollection was that it was written on properly stamped paper and that the signatures to it were genuine.

A certified copy of the expediente from the archives of Mexico and a translation of same were offered in evidence. There were also offered in evidence the original deed from Herreros, the grantee, to Juan Elias, following a copy of the testimonio, dated December 26, 1831, and other deeds and records showing title in defendant Ainsa, and it was stipulated (rec. p. 129) that said defendant had by proper deraignment connected himself in interest with

the original grantee of said grant, and that the deeds and conveyances by which he deraigned title need not be copied in the transcript.

Witness Hopkins on cross examination testified that the book of Toma de Razon at Hermosillo does not go back as far as 1825, and gave testimony as to the way title papers of grants were made. On re-direct examination he testified that the report which he made was from data taken in Hermosillo with the papers before him.

Santiago Ainsa, defendant, testified that he is an attorney at law, a Mexican by birth, knew the Spanish language, had examined 15 or 20 times in Sonora, in the capital, the Mexican archives of titles to lands in the present Territory of Arizona issued by the preceding government.

Witness was handed the paper purporting to be the titulo of the San Jose' de Sonoita grant, and testified that it was placed in his hands in 1879 or 1880 by the then owner, Mr. Alsua; that witness examined it thoroughly, translated it and presented it to the Surveyor General of Arizona; that he had examined in the archives of the treasurer general of the State of Sonora, for the purpose of ascertaining the validity of grants in Arizona; very many grants bearing the signatures of Riesgo and Mendoza, and that the signatures of those officials to the title papers shown him he believed to be genuine; that he had seen in the city of Hermosillo the matrix of the Sonoita grant, and that he was sure such matrix was genuine, as far as human nature can be certain of anything.

On cross examination he testified as to the manner of making grants, and on re-direct examination stated that neither he nor the keeper of the archives at Hermosillo had ever been able to find any book of Toma de Razon containing entries of grants prior to October 24, 1831.

The expediente or matrix of the grant offered in evidence (rec. pp. 90-108) shows that on or a few days

before May 29, 1821, one Leon Herreros, resident of the military post of Tubac, represented to the intendent governor that to the east of said post, about eight leagues, more or less, from it, was situated a place known as Sonoita, which had been anciently an Indian town and was then abandoned because of the incursions of the Apaches. In this place Herreros registered two sitios of land, and asked the intendent "to order the same to be surveyed, and to institute all the other proceedings necessary to obtain title to same."

At Arizpe, on May 29, 1821, the intendent, Cordero, granted the petition without prejudice to third persons who might have a better right, and ordered the cammander at Tubac to "proceed to the surveying of the lands registered by the petitioner, summoning adjacent owners; he will appoint experts to appraise the land at its just value, which he will publish for thirty consecutive days, asking bidders, and execute all the proceedings required by law" (rec. p. 91).

At Tubac on June 22, 1821, Gonzales, the commander of the military post of Tubac, ordered that the decree of the intendent Cordero be carried into effect, and states that "for that purpose the interested party being notified as well as the adjacent owners, if there be any, and accompanied by the necessary officials, I will proceed to the ancient, abandoned place of Sonoita, in order to survey the two sitios denounced."

On the same day Herreros was notified of the foregoing order, and at the same place of Tubac, on the same day, the commander "in order to proceed to the survey of the land claimed and to appoint the officers necessary, did so."

As to the inspection, survey and appraisement of the land, the expediente is as follows. The words two sitios, "a little more or less," appear in the original (rec. p. 111,

15th line from bottom), but were omitted by some oversight of the translator:

"On the 25th day of the month of June, 1821, being at the old, deserted place of Sonoita, accompanied by the interested party, the appointed officers and assisting witnesses, I ordered before anything else that a general reconnoissance be made of the place claimed, examining it very carefully on both sides, and after it was carefully viewed, I found it to be a place where there are some old standing walls which show by the ruins that it was anciently inhabited, and at a distance from these ruins towards the northeast something like half a league off there is a spring that runs in a ravine towares the south having various turns, ending by emptying westwardly into the river that leads to this military post, though dry, as the water disappears at a distance of two leagues, more or less, before it joins it in the neighborhood of Calabasas. In the said canon there are several small strips of arable land, and on one side of this canon and on the other there appear nothing else than continuous mountains and hills; and just now the claimant has some pieces of land under cultivation, occupying said lands and keeping sheep and swine.

In the ancient abandoned place of San José de Sonoita, on the 26th day of the month of June, 1821, I, the said lieutenant commander and sub-delegate of the military post and company of Tubac and its jurisdiction, in order to make the survey of the land denounced by Don Leon Herreros of this vicinity, delivered to the appointed officials a well twisted and stretched cord, and in my presence was delivered to them a castilian vara, on which cord were measured and counted fifty regulation varas, and this being done, at each end were tied poles, and standing on the spot assigned by the claimant as the center, which was in the very walls of the already mentioned Sonoita, there were measured in a nortneasterly direction sixty-three cords, which ended at the foot of some low hills, a little ahead of a spring—a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monument; and being about to return to the center, the claimant expressed

a desire that the survey should be continued down the canon until the two sitios, a little more or less, should be completed, that on each side we should survey to him only twenty-five cords, because if the survey should extend further, by reason of the broken-up condition of the country and the rocky hills in sight, such land would be useless to him, saying, at the same time, that, continuing the measurement along the cañon (because it was impossible to go in any other direction on account of the roughness of the ground), by reason of the many turns that had to be made, so many cords should be deducted from the total number measured as would be calculated to result in excess of the real length measured, taken on a straight line, and considering his demand reasonable I ordered the continuation of the survey as follows, to wit:

From the place where the monument was placed there was measured to the southeast twenty-five cords, which going up the valley ended on the left side of a chain of hills, and at the foot of one of them, whose slope was covered with oak trees; and on the top was placed a heap of stones as a monument; and on the opposite side there was estimated also twenty-five cords, ending on a high white hill covered with grass, distinguished by this reason from the others near it, which are part of the Santa Rita mountains, and on the top I ordered a heap of stones to be placed as a monument. In this way the measurement was finished at this end of the survey, with its proper corners and heads. Turning to the center the cord was measured in the direction of the east, and there were measured and counted twenty-five cords, ending before reaching a high mountain located on this side, on a somewhat high hill, covered with many oak trees, where I ordered a heap of stones in sign of a monument. Returning to the center the cord was laid towards the west and twenty-five cords were measured, ending on the main road to Tubac, on a little hill called the "casadero," on which was placed a heap of stones as a monument. Whereupon the survey was suspended, as it was late, to continue it to-morrow morning.

In the aforesaid place of Sonoita, on the 27th day of the said month and year, I, the said lieutenant commander, in order to continue the survey suspended yesterday,

accompanied by the officers appointed, taking as starting point the place designated as the center, the cord was extended toward the south all along down the cañon, by which there were measured and counted three hundred and twelve cords, that ended in the same cañon upon going down a hill, on the main road, at a place called the first ford, with the direction looking towards the west, on occount of the turn which the said cañon had made, and there was put a heap of stones as a monument, and as heads or corners there were estimated on the side twenty-five cords, to the other side of a ledge that ends in high rolling boulders in which a hill that forms a little valley, where I ordered to be placed a heap of stones as a monument. And on the left side there were estimated by the surveyors twenty-five cords to the first of two hills, almost exactly alike, one to the other, which are named the twins, which serves as a monument, as these are distinguished from all the other hills which surround them, and on the summit I ordered to be placed a cross. This end of the survey is about two leagues, more or less, from the Calabasas ranch at the nearest place, and on the other end only adjoins with places frequented by the enemies as they come to rob and invade the country. And in view of the suggestion made by the claimant, to reduce number of cords actually measured so much as might be calculated to be in fact in excess of the true measurement by reason of the many turns of the cañon over which the survey was made, as it could not be carried on straight, I appointed for that pupose Lieutenant Don Manuel Leon and the citizen Don Jose Ma. Sotello, who were unanimously of the opinion to deduct twenty-five cords out of the three hundred and twelve measured down the cañon, the claimant consenting thereto as just; the survey was calculated to be two hundred and eighty (seven) cords, with which this survey was finished, resulting from it one sitio and three-fourths of another sitio, registered by Don Leon Herreros for raising stock and for farming purposes; being put in possession and he being satisfied with the said survey, he was admonished that he should at the proper time designate his boundaries with monuments of stone and mortar, as is provided.

Forthwith I, the same lieutenant commander, for the

purpose of appraising and valuing the surveyed land in favor of Don Leon Herreros, of this place, ordered that there should be appointed as appraisers and I appointed as such appraisers Don Manuel de Leon and the neighbor Don Jose Ma. Sotelo officers as tallymen and surveyor of the said land which they had examined and gone over in detail, who being present I made known to them the said appointment, which they accepted, and each was sworn in the form that corresponds to each to discharge properly and faithfully this duty, without deceit, fraud or any subterfuge. In virtue thereof they said that according to and because of the examination they had made and being aware of the existing regulations on the subject, the price should be fixed at, and they fixed it at, sixty dollars for each sitio, because they have running water and several banks of arable land which can be made use of by cultivation."

On June 28, 1821, an order was made by Gonzales that the land should be put up at auction for 30 consecutive days, which was done from June 29 to July 28, inclusive. The same announcement was made at each auction as follows: "The lands of the place of San Jose' de Sonoita, situate in this jurisdiction, and comprising one sito and three quarters of another for raising cattle, surveyed in favor of Don Leon Herreros, of this place, and appraised in the sum of one hundred and five dollars, at the rate of sixty dollars per sitio, are offered for sale for royal account," etc.

On July 28, 1821, the subdelegate, Gonzales, ordered that "inasmuch as these surveys, appraisements and auctions have been concluded," the testimony of three witnesses should be taken as to the capacity of the applicant to stock the lands, and three witnesses were asked "if the said Herreros had means and property to occupy and possess the one and three quarter sitios which had been surveyed to him in the place of Sonoita," and they testified that he had.

The proceedings were then forwarded to the governor intendent, who, on October 25, 1821, referred them to the promotor fiscal (attorney general), of the public treasury. The attorney general reported, November 7, 1825, that he had "examined carefully the expediente of the lands surveyed in favor of Don Leon Herreros * * from which there resulted one sitio and three quarters of another, for raising stock and horses, valued at sixty dollars each sito," and recommended that the final sale of the land be made at the capital, and this was done on November 8, 9 and 10. The announcement at these sales was "There is to be auctioned at this board of auctions one sitio and three fourths of another of public lands, for raising cattle, comprised in the place of San Jose' de Sonoita, in the jurisdiction of the military post of Tubac, surveyed in favor of Don Leon Herreros, resident of the same, and appraised in the sum of $105," and at the final sale the expediente states that "this proceeding was concluded, there being solemnly sold the said one sitio and three quarters of another, which compose the public land surveyed, referred to in this expediente." Herreros was then ordered to pay into the national treasury the purchase price of said land and the customary charges. This he did, as appears by the receipt of the principal officers of the national treasury (rec. p. 107). At the end of this expediente or matrix, which is retained by the Mexican government and is now on file in the archives at Hermosillo, appears the note that "On May 15, 1825, title was issued on this expediente." This title is the titulo, the original and translation of which were offered in evidence and appear on pages 109–123 of the record. It differs from the expediente only in condensing and giving by way of recital some of the proceedings, such as the auctions, testimony of witnesses and final sales which are given in full in the matrix, and it contains, in addition to the matrix, the heading and the granting

clause. The heading, written May 15, 1825, is as follows: "Titulo of the sale and confirmation of one sitio and three fourths of another, surveyed in favor of Don Leon Herreros, resident of Tubac, situated in a place called San José de Sonoita." The titulo was issued at the city of Fuerte on the last mentioned date, May 15, 1825, by Juan Miguel Riesgo, commissary general, and recites that that officer granted and confirmed title "to one sitio and three fourths of another, which have been surveyed in favor of the said Don Leon Herreros, * * * adding the further condition that Don Leon Herreros shall confine himself to his own limits and boundaries described in the proceedings of survey, which should be marked by monuments of stones and mortar." The titulo recites that "note of this title is taken on page 3 of book No. 2 in this general commissaria."

Evidence was introduced to show that the map offered in evidence correctly represented the tract of land surveyed by the officials as set out in the title papers, and evidence *contra* was offered on this point. An opinion was rendered by a divided court, rejecting the grant. The sole point decided was as to the authority of the officials. Three judges held that neither the intendente nor the commissary general was authorized to bind the Mexican nation in the sale of the land. The other two judges dissented. Defendant Ainsa was granted an order of severance (rec. p. 130), and perfected his appeal to this Court. The other defendants are opposed in interest to the grant claimant, and are interested in having the decree of the lower court affirmed and the granted rejected, and did not appeal.

The controlling question in this case is, Did the intendente, attorney general and other members of the board of sales have power to bind the Mexican Federation when the board gave final judgment November 12, 1821, that the sale of the land at public auction was "legally and solemnly

executed?'' If this board had such power and was authorized to represent the Mexican government in taking payment for the land, as it did, this grant should be confirmed, because it became private property when it was thus paid for.

SPECIFICATION OF ERROR.

The court erred in rejecting this grant.

POINTS AND AUTHORITIES.

In support of the position that the acts of the intendente in ordering this sale and of the board in approving ing it and receiving payment for the land were authorized under the laws of the Mexican nation, we submit the following:

I.

By virtue of the proceedings prior to the revolution, the applicants for this Sonoita grant had acquired rights which were protected by the 13th article of the treaty of Cordova. It was the uniform policy of the Mexican government to carry out and confirm grants which had been initiated under Spain and had progressed as far as this Sonoita grant.

U. S. *v.* Peralta, 19 How. 343, 348.

U. S. *v.* Arguelo, 18 How. 540.

II.

By article 81 of the ordinance of intendentes of December 4, 1786, those officers were "judges with exclusive jurisdiction over all matters and questions that arise in the provinces of their districts in relation to the sale, composition and distribution of crown and seignorial lands," and they were exercising this jurisdiction at the date of the Mexican independence.

Sabariego *v.* Maverick, 124 U. S. 261.

Hall's Mexican law, par. 16, 85, 188.

III.

The acts of the intendent and other members of the provincial junta in this grant are presumed to be authorized.

U. S. *v.* Peralta, 19 How. 343, 347.

Gonzales *v.* Ross, 120 U. S. 605, 622, 623.

IV.

The fact that the grant was made on the advice of the Mexican attorney general and that the sale was approved by him and the other members of the provincial junta makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and regularly done.

Mitchell *v.* U. S. 9 Pet. 716, 742.

V.

The uninterrupted possession of the grantees from June 27, 1821, raises a presumption in favor of this grant.

See title paper.

U. S. *v.* Chaves, 159 U. S. 452, 464.

Barclay *v.* Howell's Lessee, 6 Pet. 498, 513.

VI.

By order of October 24, 1821, the ordinances of intendentes were continued in force without any variation.

Galvan's Collection of Orders and Decrees, 2d ed., Mexico, 1829, p. 25.

Reynolds', p. 96.

Compendium of Legislation, Mexico, 1840, p. 391.

VII.

The contemporaneous and uniform construction put upon the powers of intendentes by those officers themselves, by the commissaries general and other federal officials and by the Mexican attorneys general is conclusive that the intendentes after the revolution retained all their powers as to sales of lands.

U. S. *v.* Arguelo, 18 How. 539, 547.

U. S. *v.* Moore, 95 U. S. 760, 763, reviewing the cases.

U. S. *v.* Philbrick, 120 U. S. 52, 59.

U. S. *v.* Healey, Sup. Ct. of U. S. decided Dec. 2, 1895.

VIII.

By the 15th section of the plan of Iguala "the junta will take care that all the revenues or departments (ramos) of the state remain without any alteration whatever, and all the employees, political, ecclesiastical, civil and military, will remain in the same state in which they exist to-day," February 24, 1821. The 12th section of the treaty of Cordova provides that "upon the installation of the provisional junta it shall govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state."

IX.

By decree of October 5, 1821, and subsequent decrees, all authorities were confirmed as they then were for the purpose of legalizing their respective functions.

Reynolds', p. 95.

Decree of March 2, 1824, Decretos del Congreso Constituente del Estado a Mexico.

X.

Sales of lands under Spain were one of the revenues (ramos communes), and after the independence was established the intendentes were the fiscal agents of the Mexican Federation in the states, and the colonial system of the public treasury was retained, and public lands continued to be sold just as before the revolution.

Memoria de Hacienda y Crédito Público, Mexico, printed by the Mexican government, 1870, pp. 11, par. 37.

XI.

The sales of lands to Mexican citizens after the independence was not inconsistent with the plan of Iguala, but was, in fact, so well adapted to that plan that the same system of selling lands in force prior to the revolution was continned by the intendentes and commissaries general, by the State of Sonora, and by the Mexican republic in the time of the departments with substantially no variation.

U. S. *v.* Arguelo, 18 How, 539, *supra.*

Laws of the State of the West of May 20, 1825, and July 11, 1834, Reynolds', pp. 129, 186.

Law of Mexican Republic of October 3, 1835, Reynolds', 195.

XII.

The official declarations of the Mexican government shows that the laws providing for sales of lands remained in force after the independence.

> Circular issued by the Mexican Minister of the Interior, May 25, 1838, and approved by the President. Comp. Laws of Mexico, 3d vol., 557.

This is so declared by the Mexican jurists also.

> Preface to Coleccion de los decretos y ordenes de las Cortes de España que se reputan vigentes en la Republica de los Estados Unidos Mexicanos. Mexico: 1829.

XIII.

The official circular of January 13, 1838, specifically shows that the ordinances of intendentes had not been repealed by the revolution.

> Comp. Laws of Mexico, 3d vol. p. 447, No. 1906.

XIV.

The expediente of this grant remained in the Mexican archives, where it now is, and the official acts of the intendentes and other Mexican officials thus accepted and acquiesced in by the government, must be considered as valid even if done by them as officers *de facto*.

> Gonzales *v.* Ross, 120 U. S. 605, 619.

XV.

The official acts of the intendentes and commissaries were reported to the general government, and as they

were not repudiated they must be taken as having been ratified.

Gonzales *v.* Ross, *supra.*

Order of February 2, 1822, Reynolds', p. 99.

Order of December 24, 1821.

Decree of March 11, 1822.

Decree of December 8, 1824 (2 Galvan's Nueva Colleccion, 921).

Decree of December 22, 1824 (2 Galvan, 843, 844).

Decree of May 3, 1826 (2 Galvan, 922).

Decree of October 25, 1826 (2 Galvan, 923).

Decree of Supreme Government, April 17, 1837 (3d vol. Comp. Laws of Mexico, p. 363).

XVI.

The commissary general was the head officer of all branches of the Mexican Exchequer.

Decree of September 21, 1824 (Reynolds, 123).

The instructions issued to the commissary general of December 22, 1824, authorized him to issue final title in this grant.

See these instructions, 2 Galvan's Nueva Colleccion, pp. 836–846.

ARGUMENT.

Only one question in this case was considered and decided in the court below, and that question was, as heretofore stated, whether the Mexican officials who made this grant were authorized to do so. The genuineness, record and location of the grant were established to the satisfaction of the lower court. As all questions are open on this appeal to this Court, the minor ones of record and located are discussed hereafter. It seems proper to discuss first and most fully this question of authority of the officers.

As set out in our statement of the facts in this case, the judges of the Court of Private Land Claims were divided on this question of authority, three holding that the officers were not authorized, and the other two judges dissenting. At the outset of this discussion we call the attention of this Court to the fact that on a subsequent presentation of this question of authority in a second case, involving the exact point, the Court of Private Land Claims took a different view of the law, and held that the same Mexican officials had authority. The law as announced by the majority of the judges in this Sonoita case has been overruled by the lower court, the learned judge who wrote the opinion having himself arrived at a different conclusion on a second presentation of the question. The case in which this different conclusion was arrived at as to the power of the officers who executed this Sonoita grant is that of Maish & Driscoll *v.* The United States, involving the San Ygnacio de la Canoa grant, decided August 21, 1896. A certified copy of the decree in that case is appended to this brief, and from it it will be seen that the Canoa grant was applied for before the same officer, Cordero, as was the Sonoita; that the petitions in both cases were admitted by Cordero on the same day,

May 29, 1821; that the surveys were made and juridical possession delivered at almost the same time, viz., on June 27 and July 11, 1821, respectively; that the proceedings of survey, appraisement and publication followed the same procedure in each case; that the final sales were made December 15, 1821, in the Canoa grant, and November 10, 1821, in the Sonoita; that such sales were approved and the lands declared by the provisional board of junta "legally, publicly and solemnly sold" on December 17 and November 12, 1821, and final payments for the lands made on such dates. It will thus appear that in every point involving the sale of the lands the grants are identical, and the Court of Private Land Claims held (see its decree hereto attached) that the sale in the Canoa grant and the formal title issued thereon vested in the purchasers of the lands a title which was complete and perfect at the date when the United States acquired sovereignity over the territory where such land is situated.

The position of appellant as to the authority of the officers who made the Sonoita grant is based on the following considerations:

1. That the intendentes had power under Spain to sell land, and that this power was in existence at the time of the Mexican revolution.

2. That the proceedings in this grant which were effected prior to the revolution were such that under the treaty of Cordova and the general policy of the Mexican government, the applicants were entitled to the completion of the proceedings and the confirmation of the grant after the revolution.

3. That the powers of the intendentes and other officials were the same after the revolution as they were before, and that the intendente and provisional board of junta were authorized to represent and bind the Mexican nation by their acts after the revolution.

If these propositions are established the grant should be confirmed.

I. AND II.

It does not seem possible to doubt that before the revolution the intendentes were by virtue of the ordinances of intendentes "judges with exclusive jurisdiction over all matters and questions that arise in the provinces of their respective districts in relation to the sale, composition and distribution of crown and seignorial lands." Such powers continued up to the date of the Mexican revolution. This is so declared by the law writers. (Hall, Mexican Law, Sec. 16.) It does not appear that the cédula of 1754 or ordinance of intendentes of December 4, 1786, was ever repealed. (Hall, note to Sec. 188.)

A very full investigation as to the land grants in Arizona was made under the authority of the United States by Special Agent R. C. Hopkins, and his report, which is the fullest and most accurate ever made on the subject, is printed at pages 1125-1134 of the Public Domain, a work issued by the United States in 1884. On page 1130 Mr. Hopkins states that "from December 4, 1786, to the date of the Mexican independence grants of the royal lands were made by the intendentes or governors of provinces," and "that on the change of governments in 1821 the realengo or royal lands of the Spanish government became the public lands of the Republic of Mexico, and continued to be disposed of to settlers, by valuation and sale, much in the same manner as they had been under the Spanish government."

The same statement as to the powers of the intendentes is given in the opinion cited by this Court in Sabariego *v.* Maverick, 124 U. S. 261. In addition to this, the facts in that case, in the present case, in the case of Maish & Driscoll *v.* The United States and the other

cases which have come before this Court show that the intendentes were actually and habitually exercising such powers up to the time of the revolution, and their authority must be presumed from such continued action. This Court has uniformly so held. (U. S. *v.* Arredondo, 31 U. S. 691; Sabariego *v.* Maverick, *supra*; U. S. *v.* Peralta, 19 How. 343.) "The public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified." "The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officers making it, and throws the burden of proof on the party denying it."

This Sonoita grant was instituted under the Spanish rule, before the revolution, and was carried out and the lands sold and payment therefor made and final title issued thereon after the revolution. It is proper, therefore, to consider, first, what rights were acquired prior to the revolution, and, second, what rights were acquired subsequently. The foregoing is submitted as showing that all that was done prior to the revolution was lawfully done, as the intendente had full power to act as he did.

The majority opinion of the lower court in this Sonoita case expressed the view that the sovereignty of Spain "ceased on the adoption of the original declaration of independence, or, at the latest, that Spanish sovereignty ceased in the territory of Mexico on or before the 28th day of September, 1821, when the institution and organization of an independent government of Mexico became an accomplished fact."

This view seems to be opposed to the facts. At page 93 of the first volume of the Compiled Laws of Mexico is found the official decision of the sovereign junta "regarding the date from which emancipation from the Spanish government shall be reckoned in each place." That

decision is "that said date shall be understood to be the date at which the independence was sworn to in the capital of each province." This decision bears date February 11, 1822. The information obtained by the writer of this brief is that the independence was sworn to in Sonora in February, 1822. It seems worthy of consideration whether under this decision of the junta the acts of the intendente and other officials in making the sale of this land were not exercised by them as Spanish officials. If this is true, it is not open to doubt that the intendent had power to bind the Spanish government, and that the rights acquired by the grantees prior to the change in sovereignty were not affected by such change. This would be true without a treaty provision, but the 13th article of the treaty of Cordova provides in addition that all the inhabitants "shall be respected and protected in their persons and property."

The expediente of the grant shows that the governor intendent signed himself as such and was addressed as such and was acting as a Spanish official up to October 25, 1821, after which time he signs himself and is addressed as intendente *ad interim* (rec. p. 104). This date, October 25, is evidently the time when he ceased acting as a Spanish officer and began acting as a Mexican official under the new government. What was done by him and the other officials prior to the change in sovereignty gave the grantees rights which were protected by the treaty of Cordova, and which it was the policy and habit of the Mexican government to confirm.

The survey in this case was finished June 27, 1821, and the grant recites that the grantee being then and there "put in possession and being satisfied with the said survey, was admonished that he should at the proper time designate his boundaries with monuments of stone and mortar as is provided." That parties in the position of the grantee had by reason of the registry and survey of their sitios rights which were to be protected and confirmed, is clearly

shown by the provisions of the laws of the State of the West of 1825 and 1834. By article 27 of the law of 1825 "those who possess sitios, and who, although they have them registered and surveyed, have not obtained the title," were to present themselves to the treasury general of the state, and by article 31 "those who have an order for the registry of sitios under the former practice are guaranteed by this law." The same provision is embodied in article 61 of the law of 1834. "Those who hold sitios, and although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasury general," etc.

Under section 9 of Article 161 of the Federal constitution of 1824 it was made the duty of each Mexican state—

"To forward to the two chambers (of the federal government) and when they are in recess to the council of the government, a certified copy of their constitutions, laws and decrees."

In Clinton *v.* Englebrecht, 13 Wall. 434, referring to a law of Utah, this Court said:

"In the first place, we observe that this law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

By order of March 17, 1826 (Galvan's Neuva Coleccion, 2d vol. 634), it was made the duty of the commissaries general to procure and forward to the supreme government a copy of all the decrees, orders and regulations passed by the congresses of the states.

Under the reason of the foregoing decision it is submitted that the fact that the laws of the State of the West, thus brought to the attention of the general government, were not disapproved, must be taken as an approval of them. The general government promptly disannulled laws of the states which were considered objectionable, and did this from the earliest days. For instance, the decree of the federal government of March 9, 1829, declares that the decree of the State of the West, No. 97, of December 20, 1828, relative to one D. Francisco Iriarte, is contrary to article 157 of the federal constitution. (Vol. 1 Leyes y decretos Mexicanos, p. 7.)

The law of the State of the West guaranteeing those persons who had an order for the registry of sitios under the former practice must be considered to have been sanctioned by the supreme government, and it is submitted that the treaty of Cordova, taken with this provision of the laws, shows that the grantees herein acquired rights before the revolution which were to be completed after the change of sovereignty. It would be equitable and in accordance with the provisions of the treaty to carry to a final title proceedings begun before the revolution, even if there were no power in the intendentes to institute proceedings after the change in sovereignty. Whatever date is taken as fixing the change of sovereignty the parties who registered these lands had, before the change, acquired such rights as entitled them to a confirmation of the grant. It was well known both in 1825 and 1834 that there were many cases where sitios had been registered under the Spanish government, and also cases where the registry had gone as far as survey and possession. It was the clearest justice that these rights should be perfected by the issuance of a title in form. The laws of the State of the West carefully provided for these cases, and, as above argued, the failure of the general government to disapprove such laws must be taken as an approval of them.

The conclusion seems direct that the Mexican government proposed, through the instrumentality of the State officials, to complete proceedings which had gone as far as this Sonoita grant. There is no ground for supposing that the general government was any less just in dealing with its citizens than the State of the West was, and the Mexican officials must be deemed to have been as desirous of guaranteeing those who had an order for the registry of sitios under the Spanish government as was the State. The fact that the sitios had been registered and possessed under the Spanish government entitled the registrants to have their title completed after the change of government. This Court said in U. S. *v.* Peralta, 19 How. 343, at p. 348, that "the government of Mexico since the revolution has always respected and confirmed such concessions, when any equitable or inchoate right, followed by possession and cultivation, had been conferred by the governors under Spain. The case of Arguello (18 How. 540) was that of a permit by Governor Sola, afterwards confirmed by the Mexican government and this court."

This subjeet was considered by the Supreme Court of Texas (Blair *v.* Odin, 3 Tex. 288, 289) in passing on the effect of the independence of Texas on existing rights, in which case the court said:

"A conquering general overruns and reduces to subjection a province of (or perhaps the whole of) a neighboring independent government. What is to be the course he will adopt for the government of the conquered people? Is he to destroy at once all municipal law, all their rights of property, their customs and religion? The more expanded sentiments of humanity would furnish an answer in the negative; and would declare that it is his duty to abridge rights and privileges no further than necessity and a prudent regard to the preservation of his conquest would dictate. When an integral part of a government by a successful revolution establishes its independence,

are rights of every description to be less regarded than if the people had been subjugated by a foreign invader? Such a conclusion would be too preposterous to be for a moment thought of; nor is it believed that the principles we have been discussing could lead to any embarrassing or pernicious results to the new government."

That it was the policy of the Mexican government to confirm grants which had gone as far as this Sonoita one is shown by the various cases which have already come before this Court involving similar grants. In Cameron *v.* U. S., 148 U. S. 301, the proceedings were exactly similar. The land in that case was applied for July 19, 1821; the same governor intendente, Cordero, acted; the survey was finished October 6, 1821; the land was finally sold January 10, 1822, final payment therefor made January 11, 1822, and final title issued by the same commissary general, Riesgo, May 15, 1825.

In the San Pedro grant, which appears at pages 168-194 of the printed record of the pending case in this Court of Camou *v.* U. S., No. 834, October term, 1895, it appears that the lands were applied for March 12, 1821; the same governor intendente, Cordero, acted; the survey was finished May 21, 1821; the land was finally sold July 5, 1822; final payment therefor was made July 8, 1822.

Each of these grants involved the actions of the intendentes, and each was ratified and held good.

Counsel has cited these cases to show what construction the Mexican officials put upon their own laws at the time. This Court has stated (U. S. *v.* Arguelo, 18 How. 540) that "the contemporaneous and uniform construction put upon their powers by officials is conclusive evidence that they rightfully possessed the powers which they claimed and exercised."

The best proof of the validity of the acts of the officials in making sales like this Sonoita grant lies in the

fact, as above stated, that such action was habitually and over a long period of time and without any exception acquiesced in and expressly pronounced valid by every official before whom the grants came. We see from this grant and the one in Cameron *v.* The United States, *supra*, that three years after the sale was made the papers were examined by the commissary general, who was the chief officer of the Mexican government, and pronounced valid by him, and that title in form was issued by him upon the prior proceedings. and Mr. Hopkins' report states that this was done in a number of grants. (The Public Domain, p. 1128).

In the San Pedro grant (set out in the transcript in Camou *v.* The United States, *supra*), on October 25, 1832, more than ten years after the sale of the lands, the treasurer general of the State of Sonora laid the proceedings before the governor of that state, informing him that he considered the expediente "as sufficient, legal and completed with all the formalities established by law," and final title was issued on the proceedings of 1822. In the Canoa grant, as will be seen by the certified copy hereto annexed of the decree of the Court of Private Land Claims, the record of the sale made by the board of sales 1821 came before the treasurer general of the state of Sonora in 1849, 27 years later, and a formal title was issued on the proceedings of 1821. These acts recognized the validity of the sales made by the intendente and the board of sales, because the record of such sales was before the officers as they are now before this Court.

The Supreme Court of Texas says: "This court has repeatedly announced the doctrine that they will defer to the political and judicial authorities of other governments in the administration and interpretation of their own laws. The court will respect the acts of the former authorities, as they must have known more about their laws than we do." (Halloman *v.* Peebles, 1 Tex. 673; Hancock *v.*

McKinley, 7 Tex. 384; Edwards *v.* James, 7 Tex. 382; Cavazos *v.* Trevino, 35 Tex. 133, 157.)

"The construction of their powers and of the laws which conferred them, adopted and acted upon by the authorities under the former governments of the country must be respected until it be shown that they have clearly transcended their powers, or have acted manifestly in contravention of law. The presumption must be that they rightfully possessed and exercised those powers which they were accustomed to exercise, until the contrary be shown." It would not be reasonable to suppose that the high officials who acted in the execution of this grant did not have "as enlightened views in respect to the true policy of the government and as just an appreciation of their powers and duties as we possess in respect to them." (Hancock *v.* McKinney, *supra.*)

The majority of the lower court overlooked the fact that the proceedings before the revolution gave the parties rights which entitled them to have the proceedings consummated and final title issued thereon after the revolution. The title paper of this grant shows that prior to the revolution the grantee had incurred the expense of making application for the land and other expenses incident thereto, namely those of the notifications, the declarations of the witnesses as to ability to stock the lands, the expenses of the surveyor, those of the auctions, the fees of the cryer and drummer, the charges for stamped paper, etc., etc. The fact is of the greatest importance that prior to the revolution the applicant was put in possession of the land. This the title paper states under date of July 11, 1821. The interested party was "put in possession, and he being satisfied with the said survey, he was admonished that he should at the proper time build up his monuments of stone and mortar, as is provided."

This state of facts brings the case directly within the ruling in U. S. *v.* Peralta, above cited. We have shown,

in addition, that the State of Sonora passed laws, which must be taken as meeting with the approval of the general government which recognized the justice of confirming grants like the Sonoita, and when we examine the best evidence of all, to wit, the action both of the state government and of the general government, as shown by the similar grants cited, we find that both these governments habitually recognized and confirmed grants which had progressed as far as this one had. Such rights were, as above stated, guaranteed by the treaty of Cordova.

It is therefore respectfully urged that the acts of the intendentes in carrying on these proceedings after the revolution were in accord with the treaty and the policy of the Mexican government.

It is submitted that this uniform practice of the intendentes, recognized and ratified by the supreme government, brings this case within the doctrine of U. S. *v.* Arguelo, 18 How. 539, *supra*, where, construing the powers of the Mexican governors, this Court said, at p. 549, "If anything further were wanted to fortify this construction, the uniform practice of the territorial governors would be conclusive." The uniform practice of the intendentes is conclusive as to their powers.

III. AND IV.

As showing that the intendente was authorized, we rely, further, most strongly on the fact that the final sale was made on the advice of the Mexican attorney general or promotor fiscal. In Mitchell *v.* U. S., 9 Pet. 716, at page 742, this Court had under consideration the validity of a sale which had been made under the advice of the Spanish attorney general, and held that as the grant was made on such advice, the presumption was very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done. This holding is applicable to

the present case. In Hornsby *v.* U. S., 10 Wall. 224, this Court repeated what it had announced in Fremont's case, 17 How. 561, that it "could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution."

The same principle is announced by the Supreme Court of California: "The general rule is that when the acts of a foreign government are brought in question in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears." Mott *v.* Reyes, 45 Cal. 379, 385.

Under article 81 of the ordinances of intendentes no sale was made until "the matter had been duly examined into by an attorney of the royal treasury," and the intendents in making sales of lands took action in conjunction with their ordinary legal advisers. (Reynolds, 61.) By the decree of October 5, 1821 (Reynolds, 95) of the sovereign provincial council of government of the Empire of Mexico, all authorities were "habilitated and confirmed as they then were, in conformity with the plan of Iguala and the treaty of the village of Cordoba, for the purpose of legalizing the exercise of their respective functions." The 15th section of the plan or Iguala provides that "the junta will take care that all the revenues or departments (ramos) of the state remain without any alteration whatever, and all the employees, political, ecclesiastical, civil and military, will remain in the same state in which they exist to-day." By the treaty of Cordova, "the provisional junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state."

By decree of February 26, 1822, the sovereign constituent congress "confirmed for the present all authorities, civil as well as military, of whatever kind they may be." (2 Galvan's New Colection, 849.) By decree of March 2, 1824, "the constituent Congress of the Free, Independent and Sovereign State of Mexico decreed that * * the governments of cities and other corporations, civil as well as military and ecclesiastical, will continue to perform their official duties as theretofore committed to them, being guided in everything by existing laws."

These decrees show that the promoter fiscal, or attorney general, under the Spanish rule, was confirmed as he then was for the purpose of legalizing the exercise of his office. He thus became a duly authorized Mexican attorney general, and was such on November 7, 1821, when he gave his written opinion (rec. p. 103) that the land should be sold. The land was ordered to be sold "in accordance with the opinion of the promoter fiscal" (rec. p. 104), and this brings this case directly within the ruling of this Court in Mitchell *v.* U. S., 9 Pet. 716, *supra*. The present case is even stronger, for the attorney general was one of the members of the board of sales, and took part in the proceedings, and he was also one of the members of the provincial junta, and, with the other members, made the written and formal statement (rec. p. 107) that the sale had been "legally and solemnly executed."

The importance of this fact will not, we feel sure, be overlooked by this Court. The validity of the proceedings of the sale of these lands is called in question in this case. In considering this question we find that the properly constituted and acting law officers of the Mexican nation, the owner of the land and the granting power, considered the same question and gave their legal opinion that such sale was legal. This was done not in one isolated case but in all the cases which have come before this Court. Can it be

urged with any show of reason that these Mexican attorneys general did not know the laws of their own country, or that their official opinions are to be disregarded? The grantee was put in possession, as above stated, June 27, 1821. A transfer of the grant was made more than ten years after. The expediente of the grant has remained in the archives of Mexico to the present day, three-quarters of a century. The possession given to the grantees was never disturbed, so far as appears by the record, and must be presumed to have continued. The sale, which was pronounced valid by the attorney general, has been for all this long period of years respected by all the authorities, national and state, and was expressly recognized as valid when the grantee, Herreros, and the owner of the adjacent grant appeared before the commandant of the presidio of Tubac, and made the agreement regarding the boundaries of this Sonoita grant. (Rec. p. 41). Under these facts it seems impossible to avoid the conclusion announced in a similar case by the Supreme Court of Texas (Cavazos *v.* Trevino, 35 Tex. 133, 165), "It is fairly to be presumed from the long-continued possession of the appellees under both the Spanish and Mexican governments, disturbed by no action of the political authority, and questioned by no adverse claimant, that the grant was in all respects regular and legal," and in Johns *v.* Schutz, 47 Tex. 578, 582, where the court said: "As has been often said, it will be presumed that the acts of a former government are within and not in excess of their authority. This presumption, in connection with an undisturbed possession of about forty-five years, more than twenty of which elapsed while the land in question was subject to the jurisdiction from which the grant emanated, is quite sufficient to establish the *prima facie* validity of the grant."

VI.

These decisions of all the Mexican law officials that the intendentes had power to act as they did, raise an irresistible presumption that such actions were regular. But we are not left to presumption, as strong as it may be. There is express statutory authority giving the intendentes power to act after the revolution just as they did before that time This is found in the law of October 24, 1821 (Reynold's p. 96), in which it was ordered that the "intendentes in the cases and matters that severally belong to them" act "in conformity with their ordinances without any variation in them, consulting the regency or the Sovereigh Council (Junta) in those things or matters within their attributes, the determination of which may not be within the power of said officers or offices."

This statute so clearly continues the intendentes in office without any change in their powers that no extended comment on it is necessary. It is submitted as direct, unequivocal authority that the ordinances or intendentes were in force without any variation at the time the intendente acted in this Sonoita grant, and that therefore his actions were lawful and authorized.

It was, in fact, universally understood that the ordinances of intendentes were in force, without change, after the revolution. The "Repertorio de Legislacion," or Compendium of Legislation, published in 1840 in Mexico (a copy of which is in the law library at Washington) contains an "alphabetical and chronological index of the most noteworthy matter contained in the collection of laws, decrees and mandates that have been issued in the Republic from the year 1821 to the year 1837, including the two volumes in which the laws and decrees of the Spanish Cortes and those issued by king Ferdinand VII. have been amended (or remodeled), and which are held to be in force and form a complement (part) of said collection.

A most useful work for all kinds of persons and especially those who dedicate themselves to the study of jurisprudence."

"On page 391 of this work is the following: "Ordenanzes de Intendentes. No se hara variacion alguna en ellas. Orden de 24 de Octubre, de 1821," the translation of which is "Ordinances of Intendentes. No change whatever shall be made in them. Order of October 24, 1821."

It is simply unquestionable that the Mexican law writers as well as the Mexican officials thought that the ordinances of intendentes had been continued in force without any variation whatever.

The Supreme Government of Mexico itself in 1838 recognized the Ordinances of Intendentes as being in force. This is shown by the circular found on page 552 of the 3d volume of the Compiled Laws of Mexico.

This statute of October 24, 1821, and the interpretation given it by the Mexican law writers were not known to counsel or the lower court when this Sonoita case was argued. It is understood that when the statute was called to the attention of the court when the question of the power of the intendente again came before it in the Conoa case, the statute was regarded as showing that the intendente had power, and was the reason why the court took a different view of the law. It is submitted that the statute as interpreted at the time furnishes a direct answer to any question that may be raised as to the power of the intendent to act as he did in this grant.

In addition to the presumption arising from the opinion of the attorney general, there is the presumption arising from the grant itself. This Court has said in Gonzales *v.* Ross, 120 U. S. 605, *supra*, that where a "public officer has a public duty to perform, in the absence of evidence to the contrary the presumption would be that he acted in accordance with the law as known at the time.

* * All favorable presumptions will be made against the forfeiture of a grant." A material question in this case is, Where officers had, prior to the revolution, power to make sales of lands, what presumptions attach to their acts after the revolution and before the passage of any new laws on the subject? This question is specifically answered in U. S. *v.* Peralta, 19 How. 343, *supra*. There one Sola was the Political and Military Governor, under Spain, of California. He continued to exercise the same powers after his adhesion to the Mexican government under the provisions of the plan of Iguala and the 12th section of the treaty of Cordova, and in October, 1822, after the revolution, issued a grant in fee to lands where the proceedings had been instituted prior to the revolution. His authority to do so was called in question, but this Court held "it is sufficient for the case that the archives of the Mexican government show that such power (to grant land) has been exercised by the governors under Spain and continued to be so exercised under Mexico, and that such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities." It certainly seems that this decision directly controls the present case. The archives show that the intendente and board of sales exercised such powers under Spain and continued to exercise it under Mexico, and that such grants have been confirmed and held valid by the Mexican authorities.

X.

But even if there was not the statute and presumptions as to the power of the intendentes to make sales of lands, it would be clear from the plan of Iguala and the treaty of Cordova that sales were to be made after the revolution just as before. The 15th section of the plan of Iguala provides that "the junta will take care that all the revenues or departments (ramos) of the state remain with-

out any alteration whatever, and all the employees, political, ecclesiastical, civil and military, will remain in the same state in which they exist to-day," February 24, 1821.

The Mexican governmant officially published in 1870 the Memoria de Hacienda y Cérdito Público, presentada el Secretario de Hacienda al Congreso de la Union," a work giving the detailed history of the government of Mexico under the many forms which it assumed, and of the treasury department in the various epochs. On pages 62 and 63 of this work the colonial epoch, the one preceding the revolution, is treated of, and it is shown that one of the "ramos communes" was that of the "ventas, compras y confirmaciones de tierras," sale of royal lands. The revenues which have been received from such sales are given in a tabulated form with the other "ramos comunes."

Here, it is submitted, is the unimpeachable historical proof, furnished officially by the Mexican government, that one of the revenues or "ramos" which were to "remain without any alteration whatever," was the sale of vacant lands such as are embraced within this Sonoita grant. As this particular revenue remained without any alteration whatever," sales would have to be made by the same officers and in the same manner as before. On page 11 of this Memoria it is stated that "the fiscal agents of the governments in the states were the intendentes," and that "when the independence was established the colonial administrative system of the public treasury was retained." Accordingly, as in shown in the extracts heretofore given from expedientes between the years of 1821 and 1825, in every case charges were made as they had been under Spain. The officers did, in fact, what they were bound to do under the plan of Iguala, that is, they kept the revenues from the sales of lands in force "without any alteration whatever."

By the treaty of Cordova "the provisional junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state."

That the laws for the sale of lands to Mexican citizens were not opposed to the plan of Iguala is shown by what may be fairly termed a volume of evidence. It has been above seen that all of the officials considered these laws in force, and acted under them. When the State of Sonora came to make its law of May 20, 1825, it declared, article 32, that "the tax for army expenses, the half annate tax and the percentage which the former government collected as a general tax are abolished." This fact shows that the system of selling lands under the former government was not abolished by the change of sovereignty, but that it continued under the intendentes and commissaries up to the passage of this law.

And as absolutely conclusive on this point we cite the official circular issued by the Minister of the Interior of Mexico, on May 25, 1838, and approved by the President, found on pp. 1021-1022 1st vol. Galvan's Colleccion de leyes y decretos, and also on p. 557, 3d vol. Comp. Laws of Mexico, as follows:

"It must be principally noted that there are in force all such laws as are not openly inconsistent with the prevailing system and unless they are found to have been expressly repealed by any other subsequent disposition, this rule also holding good in regard to those laws which were decreed (passed) in the very remote epochs, and under the different forms of government which the nation has had; and that, therefore, the courts and other authorities daily transact their various duties under the existence of the laws of the Cortes of Spain, of the laws of Partidas and Compilation, as long as this disposition is not repugnant, more or less, to the form of government in which they were sanctioned.

"This principle being established, there follow two natural consequences; the first is, that there ought to be

considered as in force the laws of the old States, whenever these contain the requisites mentioned above, unless they are repugnant to the form of government under which they had their origin, or unless the supreme government has enacted any other, since their requirements cannot be superior (paramount) to the laws.

"The other consequence is, that if the orders of the government were the result of some of its constitutional attributes, or of some other subsequent law that authorized such or another act, then the laws of the States ought not to be considered as in force, not because they are repugnant to the requirements of the government, but because the law authorizes it to decree this or the other decree contrary to it, by the same right that any other decree is abolished by former legislation.

"From the foregoing it is the opinion of the commission that the advice of the government can be obtained, unless the council, with better judgment, resolves differently.

"Be pleased, your Excellency, to advise his Excellency and receive the documents which were transmitted.

"And this being approved by the President, he has seen fit to order it to be communicated to the governors of the departments, so that they may take notice of this decision for the general good."

XI, XII and XIII.

The ordinances of intendentes, providing for the sales of lands to Mexican citizens, were not repugnant to the form of the government under which they were sanctioned, nor were they repugnant to the government after the revolution, for lands were sold in the same way by the states, and the state laws for selling lands were continued in force under the departments. If it was not opposed to the plan of Iguala for the new government to sell, for an adequate consideration, lands to its own citizens in a part of its domain where every reason existed to promote settlement and occupancy of the vacant lands, and thus give protection to the frontier from the Indians, then the laws

for the sale of lands existing before the revolution were continued under the intendentes. We believe that the Mexican nation recognized that it was as necessary for its citizens to own land, raise cattle and pursue the ordinary vocations of life after the revolution as before, and that as the laws for the sale of lands under the intendentes had been in successful operation so long, it was the part of wisdom to continue them rather than go to the unnecessary trouble of making new laws.

This Court in the Arguelo case, 18 How. 539, *supra*, speaking of the policy of Mexico with regard to the sales of lands to her own citizens, said:

"While a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and seacoast, we cannot impute to them (the supreme government of Mexico) the weaknesses or folly of confining their native citizens to the interior, and thus leaving their seacoast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners would encourage the settlement of natives within those bounds. The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers."

The statement in the majority opinion in the Sonoita case that "the government of Mexico made no law authorizing disposition of the public domain until January 4, 1823," is quite true, if a new or different law is referred to, because the existing laws were adequate and were kept in force by the plan of Iguala and treaty of Cordova. No new law was passed because none was needed.

XIV and XV.

By repeated enactments the intendentes and commissaries general were required to report all their proceedings to the supreme government and to furnish a list of

all the archives under their charge. By order of February 2, 1822 (Reynolds, p. 99), it was enacted

"That a report of the receipts of the treasuries since independence was sworn to be forwarded by the intendencies of the empire; and a statement of the receipts and disbursements of the last 15 days since the 24th of December, 1824, and repeat this operation hereafter in the same period."

The decree of December 24, 1821, was

"First. That the intendencies shall transmit a clear and detailed statement of the resources existing in the principal and sub-treasuries of their respective districts on hand in each department at the time the independence was sworn to in the places where these offices exist.'

Again the decree of March 11, 1822, provides

"2. The general treasury and all the district and sub-treasuries shall transmit every month to the secretary of the treasury an exact statement of the funds received, disbursements made and balance on hand, for his information and that he may make such disposition of said balance as will best serve the welfare of the nation."

By decree of December 8, 1824 (2 Galvan's Nueva Colleccion, 921), which was communicated to all the commissaries, they were commanded to prepare an orderly arrangement of the archives of each commissary, together with an index (table of contents).

Again by decree of December 22, 1824 (2 Galvan, 843, 844), the instructions to the commissaries provided that

"Art. 72. At the time of their assuming their duties in the different branches to be under their charge, the commissaries general shall take care to make exact and correct inventories of whatever may appertain to each branch, of all property on hand in the different classes which compose the same, as well as of all papers, causing the latter to be arranged in an orderly manner and not allowing any of them to be lost, inasmuch as they must

form the references in every case that may present itself."

This decree was referred to in the one of March 1, 1826 (2 Galvan, 922), communicated to the commissaries general, wherein it was stated that they must have prepared "the index or inventory of the archives of the former intendency as well as that of each commissary office," and the commissaries general were directed by order of the president to forward a copy of said indexes or inventories to the general government as soon as possible.

By decree of May 3, 1826, (2 Galvan, 922), communicated to all the commissaries, they were required on the last day of each month "to prepare a report of all tranactions of their office, with a list enumerating all cases, one by one, stating the nature thereof, what has been done in the premises, who has it in hand, and the cause of its non-settlement."

By decree of October 25, 1826 (2 Galvan, 923), communicated to all the commissaries general of the federation and to the secretaries of the general treasury, those officers were to render "an exact statement of all cases which remain pending in their offices, explaining their present state, and noting on the margin the amount in favor of the public treasury involved therein."

Again, the law of April 17, 1837, of the supreme government (3d vol. Comp. Laws of Mexico, p. 363), provided that inventories of all documents should be taken and forwarded to the supreme government.

The above laws show that the duty was time and again enjoined on the intendentes, treasurers and subtreasurers and on the commissaries general to render to the supreme government a full abstract or inventory of all the documents under their charge, and a detailed statement of moneys on hand and of receipts. Under these

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 27.

SANTIAGO AINSA, ADMINISTRATOR, APPELLANT,

vs.

UNITED STATES.

Copy of Affidavit of George J. Roskruge, and Other Documents Filed for Appellant.

(Copy.)

TERRITORY OF ARIZONA, } ss:
Pima County, }

George J. Roskruge, of lawful age, being duly sworn according to law, makes oath and says that he is a surveyor and has been such for about 27 years; that he has lived in Pima county, Arizona Territory, about 25 years; that during that time his occupation has been that of a surveyor; that he has been county surveyor of said Pima county, chief draughtsman in the office of the U. S. surveyor general for Arizona, chief clerk in said office, and also has been the U. S. surveyor general for said Territory; that he is the person who surveyed the San José de Sonoita private land claim or grant and who made the map thereof, a copy of which faces

page 122 of the printed record in case No. 15708, Ainsa, adm'r, etc., *vs.* The United States, in the Supreme Court of the United States; that he is the same person who made the official map of Pima county, Arizona, marked "Official map of Pima county, Arizona; authorized by board of supervisors; compiled and drawn by George J. Roskruge, ex-county surveyor;" that said map was made by him from data collected during about 18 years, and that it is accurate and correct.

Affiant further states that he has, with the very utmost care possible, calculated the area of the land contained within the limits of said private land claim, as represented by the map facing page 122 aforesaid; that such area was computed, first, by the method of scale and protractor, as laid down on page 170 of Trautwine's Engineers' Pocket Book, which is a standard work on land surveying; that according to such computation the area within the limits of said map is 12,340.72 acres, and no more; that affiant again, with the greatest care and accuracy, computed said area by a mathematical computation by latitude and departure, according to which computation the area within the limits of said map is 12,447.97 acres, and no more.

Affiant further states that the aforesaid calculations are as nearly accurate as can be made, and that it is mathematically impossible that the area within said map can vary materially from the aforesaid figures.

GEORGE J. ROSKRUGE,

Subscribed and sworn to before me this 15th day of February, 1898.

LAUTARO ROCA,
Notary Public, Pima County, Arizona.

My commission expires October 14, 1901.

(Copy.)

(Seal of the State of Sonora.) (Canceled stamp.)

VICTOR AGUILAR, Treasurer General of the State of Sonora, Republic of Mexico.

I certify that in the archives of this treasury general there exists a document of the following tenor:

Index of the unfinished titles of lands which in July, 1829, were delivered to me at Alamos for their transmittal to this office by the then commissary general of the State of the West, Don Juan Miguel Riesgo.

A title of land at the place called Lo de Rodriguez, in favor of Don José Alday and Don Pedro Contreras, as husband of Da. Rosa Alday.

Another at the place called Jesus Maria (á) El Bacuachi, in favor of Don Juan de Dios Noriego.

Another at the place called San José (á) La Nopalera, in favor of Dn. José Maria Acuña.

Another at the place called Las Lajitas y Palos Blancos, in favor of Dn. Ygnacio Flores.

Another at the place called San Benito (á) La Palmita, in favor of Don Benito Tapia, Don Domingo y Don Francisco Canas.

Another at the place called San Nicolás y Sesentona, in favor of Don José Domingo Ayllon.

Another at the place called Los Sinaloas, in favor of Don Narciso Montoya.

Another for a place between the middle of Cocoraqui and the Alamo de los Ybarras, in favor of Don José Antonio Sotomayor.

Another for the place San José de Los Alamos, in favor of Don José Grijalba.

Another at the place called El Palmarito, in favor of Don José Antonio Lapisco.

Another at the place called La Casa Colorado, in favor of the residents of the town of Cumpas.

Another at the place called Los Chinos, in favor of Don José Louis Rendon.

Another at the place called La Peña Blanca y el Sapuchi, in favor of Don Pedro Galvez.

Another at the place called San Antonio del Aguaje, in favor of Don Francisco Olguin.

Another, which contains two small memorandum books and a statement giving information about the lands called San Joaquin, which were denounced by Don Joaquin Zazueta.

Another of the place which is situated between the sitios Aramuapa, Llano del Venado, Alamo, and the endowment of the town of Ocoroni, denounced by Don José Maria de Olivar y Monge.

JOSÉ MARIA MENDOZA.
ANTONIO CARRILLO.

ARISPE, *June* 30, 1831.

This is given at the request of Mr. Rochester Ford, at Hermosillo, on the 24th day of January, 1898.

V. AGUILAR.

Translation from the Preface to the Collection of the Decrees and Laws of the Cortes of Spain which are Considered in Force in the United States of Mexico. Mexico, 1829. Print of Galvan, under the Charge of Mariano Arevalo.

"The independence of Mexico having happily been established by the occupation of its capital on the 27th of September, 1821, as well as the destruction of the vice-royal government, although the ties of dependence upon Spain were forever broken, the laws which regulated the duties and rights of those who composed this new society could not and ought not to be considered as abrogated, inasmuch as such laws could not be changed except in the course of time and by the competent authorities. The sudden abolition of all the laws would have been equivalent to the establishment of an absolute monarchy at a crisis when there was the greatest necessity for security.

"Thus it is that, with the exception of those laws which directly conflict with the memorable plan of Iguala and the new order of things which it created, all the other laws which had emanated from the Kings of Spain and the sovereign authority which had been recognized up to that time continued to be respected and observed. Unsettled questions were decided by such laws, justice was administered in conformity with such laws, and according to the tenor of such laws the Mexicans adjusted their social life."